No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should this Court overrule its holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, that plaintiffs wishing to file a Fifth Amendment takings claim in Federal District Court under 42 U.S.C. § 1983 are first required to "seek compensation through the procedures the State has provided for doing so?"

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE STATE LITIGATION REQUIREMENT SPRANG INTO EXISTENCE *EX NIHILO* BEFORE THIS COURT, WITHOUT BENEFIT OF PRIOR BRIEFING OR ARGUMENT IN ANY LOWER COURT 4

A. Certiorari Was Granted in *Williamson County* to Determine Whether Compensation Is Required for a Temporary Regulatory Taking 4

B. The Amicus Brief for the United States Argued – for the First Time at Any Stage of the Litigation – That the Case Should Have Been Dismissed Because Hamilton Bank Had Not Sought Just Compensation Through State Procedures Before Suing in Federal Court 7

C. Ultimately, the *Williamson County* Majority Crafted a New Ripeness Doctrine Out of Whole Cloth, Based Largely on Behind-the Scenes Debate and Negotiations Within the Court Itself 10

II. THE STATE LITIGATION REQUIREMENT WAS BASED ON NO PREEXISTING LEGAL PRINCIPLE OR DOCTRINE 12

A. The *Williamson County* Court Struggled Futilely to Find Some Doctrinal Anchor for Its Newly Minted Ripeness Requirement 12

B. In a Second Flawed Analogy, *Williamson County* Misconstrued the State Judiciary as the Functional Equivalent of the Court of Federal Claims 14

C. At Bottom, the State Litigation Requirement Rested On an Implicit Non Sequitur 16

III. BECAUSE *WILLIAMSON COUNTY*'S NEW "RIPENESS" RULE RESTED ON NO PRE-EXISTING CONSTITUTIONAL DOCTRINE, ADDITIONAL FACETS OF THE RULE HAVE BEEN ADDED HAPHAZARDLY OVER TIME, AS THE COURT DISCOVERED THEM IN RESPONSE TO THE CIRCUMSTANCES OF PARTICULAR CASES 18

IV. THE STATE LITIGATION REQUIREMENT DID NOT SPRING FROM FEDERALISM CONCERNS 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979) ... 5

Agins v. City of Tiburon, 447 U.S. 255 (1980) 5

Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824 (9th Cir. 2004) 2

City of Chicago v. International College of Surgeons, 522 U.S. 156, 174 (1997) 19, 24

Colony Cove Properties, LLC v. City of Carson, 640 F.3d 948 (9th Cir. 2011) 2

Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, 729 F.2d 402 (6th Cir. 1984) 6

Irvine v. California, 347 U.S. 128 (1954) 8

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 8

Kottschade v. City of Rochester, 319 F. 3d 1038 (8th Cir. 2003) 19

Mitchum v. Foster, 407 U.S. 225 (1972) 21

Parratt v. Taylor, 451 U.S. 527 (1981) 7, 9-14, 18, 23

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 4

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 14, 15

San Diego Gas & Electric Co. v. City of San Diego,
450 U.S. 621 (1981) 5

San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005) 3, 4, 21-24

Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl Prot., 560 U.S. 707 (2010) 20

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997) 19

United States v. Mendenhall, 446 U.S. 544 (1980) .. 8

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) ..... *passim*

Statutory and Constitutional Provisions

28 U.S.C. § 1491 ..... 14, 19
42 U.S.C. § 1983 ..... 3, 7, 15, 21
U.S. Const. Art. III 3, 20
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U.S. Const. amend XIV 7, 9

Supreme Court Rules

Sup. Ct. R. 14.1(a) 8

Sup. Ct. R. 37.3 1

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Brief for Respondent, *Williamson County*, 473 U.S. 172 (No. 84-4), U.S. S. Ct. Briefs LEXIS 1235 9

Brief for the United States as Amicus Curiae Supporting Petitioners, *Williamson County*, 473 U.S. 172 7

John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 Envtl. L. Rep. News & Analysis 10735 (2013) 23

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Memorandum from Justice William Rehnquist To Chief Justice Warren Burger dated Feb. 25, 1985. Library of Congress: Harry A. Blackmun Papers, Box No. 425, case folder 84-4 10

Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979 (1986) 18

Michael R. Salvas, *A Structural Approach to Judicial Takings*, 16 Lewis & Clark L. Rev. 1381 (2012) 23

Transcript of Oral Argument, *Williamson County*, 473 U.S. 172 (No. 84-4), 1985 U.S. Trans LEXIS 76 10

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, the Western Manufactured Housing Communities Association (WMA) submits this brief amicus curiae in support of Petitioner Rose Mary Knick.[1] WMA is a statewide trade association representing the owners of 1,700 manufactured/mobilehome communities throughout California, containing approximately 180,000 homes. WMA was founded in 1945 and is the largest and oldest trade association representing community owners in California and in the United States. WMA is a 501(c) (3) mutual benefit nonprofit corporation whose mission is to preserve and promote the interests of manufactured/mobilehome community owners, operators and developers. WMA's activities include educational programs and legislative and judicial advocacy, including amicus curiae appearances in leading cases before this Court, the Ninth Circuit Court of Appeals, and the California Supreme Court.

WMA's members are interested in this case because it presents an opportunity for the Court to remedy an injustice that plagues park owners and other property owners across the nation: the inability to seek vindication of their Fifth Amendment rights in federal court. WMA's members have been among the many property owners who have been barred by

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[1] The parties have filed with the Clerk letters granting blanket consent to the filing of amicus curiae briefs in this case. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City from obtaining a federal-court remedy for violations of the Takings Clause. *See, e.g., Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824 (9th Cir. 2004); *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948 (9th Cir. 2011).

WMA seeks to provide the Court with an additional viewpoint on the origins and development of *Williamson County*'s requirement that plaintiffs must submit their Fifth Amendment takings claims to state courts in order to "ripen" them for federal adjudication. This requirement was based on no preexisting judicial doctrine, nor did it emerge from the deliberations of any lower courts. In effect, *Williamson County*'s state litigation requirement was created on the spot, out of whole cloth. In view of this rule's disastrous, largely unforeseen, consequences for property owners attempting to vindicate their Fifth Amendment rights, WMA and its members believe this Court can best serve the interests of justice by overruling it, and once again allowing takings claims against local governmental entities to be taken directly to federal court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a fundamental injustice that has become all too common over the past 33 years. When Scott Township violated Petitioner Rose Mary Knick's rights under the Takings Clause of the Fifth Amendment to the United States Constitution, Ms, Knick filed suit in Federal District Court under 42 U.S.C.§ 1983, asking that the Township be required to comply with its constitutional obligations. Yet

despite the frequently reiterated obligation of the federal courts to exercise the jurisdiction granted them by Congress under Article III, the District Court dismissed Ms. Knick's takings claim, and directed her to seek a remedy in the Pennsylvania State courts. The dismissal was upheld by the Third Circuit Court of Appeals, under the "ripeness" doctrine established by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1986).

Williamson County's so-called state litigation requirement – under which a Fifth Amendment takings claimant is required to seek just compensation in state court to "ripen" her federal takings claim – is an anomaly in constitutional law and should be overruled. As this brief amicus curiae will demonstrate, the state litigation rule was injected into the *Williamson County* case at the last minute by a single amicus brief filed in this Court. Although the *Williamson County* opinion attempts to find support for the new rule by analogy to procedural due process cases and suits seeking compensation from the United States in the Court of Federal Claims, there was in fact no doctrinal support for the state litigation rule in constitutional text or case law, nor is there any now.

Because the state litigation rule was coined on the spur of the moment, its full ramifications had not been fully thought out. Consequently, the rule was modified and adjusted over the years, until this Court's decision in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005) confirmed that, in conjunction with standard principles of issue preclusion and the Full Faith &

Credit Act, complying with *Williamson County* did not "ripen" federal takings claims; it extinguished them. At this point the state litigation requirement had morphed into the very opposite of what the *Williamson County* Court intended.

Finally, although some commentators have sought to ground the state litigation rule in principles of federalism, this effort is misguided. As Chief Justice Rehnquist observed in his *San Remo* concurrence, no such principles were involved in the *Williamson County* decision, and none have developed since then. 545 U.S. at 350.

ARGUMENT

I.

THE STATE LITIGATION REQUIREMENT SPRANG INTO EXISTENCE *EX NIHILO* BEFORE THIS COURT, WITHOUT BENEFIT OF PRIOR BRIEFING OR ARGUMENT IN ANY LOWER COURT

A. Certiorari Was Granted in *Williamson County* to Determine Whether Compensation Is Required for a Temporary Regulatory Taking

The *Williamson County* case originally had nothing to do with ripeness, much less with establishing the proper court in which to sue for a taking. In the early 1980s, in the wake of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the burning question in takings law was whether the Fifth Amendment demanded just compensation when a regulation effectively deprived

an owner of the use of his property, or if rescinding the offending measure was an adequate remedy.

In *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), the California Supreme Court had recently announced that the only remedy available for a regulatory taking in the courts of that state was invalidation of the offending measure. This Court agreed to review *Agins* to determine whether a compensation remedy is required when land-use regulations violate the Takings Clause. But instead, the Court ruled that since the restrictions in *Agins* did not rise to the level of a taking, the hypothetical availability of compensation was irrelevant. *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980).

Just days after handing down its decision in *Agins*, this Court again took up the compensation issue in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). In that case, as in *Agins*, a California court had dismissed a takings claim on the grounds that just compensation for a regulatory taking was not available in that state as a matter of law, and the constitutional propriety of that policy was the sole question presented to this Court. A majority in *San Diego Gas*, however, ultimately dismissed the appeal on the grounds that the California judiciary had not yet rendered a final decision on whether a taking had in fact occurred. *Id.* at 633.

Most observers expected this issue would at last be resolved when the Court agreed, three years later, to hear *Williamson County*. Unlike in *Agins* and *San Diego Gas*, Hamilton Bank's takings claim had been fully adjudicated by a trial court. A federal jury had found that the county's denial of required

development permits effected a violation of the Takings Clause, and awarded $350,000 in compensation for the temporary taking of the undeveloped portion of the property. The Court of Appeals affirmed, establishing for the first time that "compensation must be paid for a temporary regulatory taking." *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d 402, 409 (6th Cir. 1984). The Commission's petition for certiorari to this Court was granted "to address the question whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Williamson County*, 473 U.S. at 185. This was the issue addressed by Williamson County's opening brief on the merits, as well as by 26 of the 27 amicus briefs filed in the case. But one amicus brief diverged from the question on which certiorari had been granted, and in doing so, led this Court down a disastrous doctrinal cul-de-sac that would wreak havoc with takings law for more than 30 years.

B. The Amicus Brief for the United States Argued – for the First Time at Any Stage of the Litigation – That the Case Should Have Been Dismissed Because Hamilton Bank Had Not Sought Just Compensation Through State Procedures Before Suing in Federal Court

The amicus brief filed by the Solicitor General on behalf of the United States addressed a different question, one that had not been raised by the parties or considered by the courts below:

> "Whether, under this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), respondent's claim that its property was taken without just compensation in violation of the Fifth and Fourteenth Amendments should have been dismissed because respondent did not pursue procedures under state law to obtain compensation or show that those procedures are inadequate."

Williamson County, Brief for the United States as Amicus Curiae Supporting Petitioners, at 1. This was a startling and puzzling proposition. No Supreme Court opinion had ever suggested that plaintiffs complaining of a violation of the Takings Clause were required to seek compensation in any other venue before filing an action under 42 U.S.C. §1983 in federal court. Second, the issue had not been raised, briefed, or argued at any point in the previous thirty months of litigation, nor did the Williamson County Regional Planning Commission itself ever address the possibility that the takings claim against it was not ripe.

This Court normally seeks to guard against deciding important questions of first impression without guidance from the deliberations of lower courts. Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court." Adhering to this rule, the Court has noted, "helps ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993). The Court continued: "[f]aithful application [of Rule 14.1(a)] will also inform those who seek review here that we continue to strongly 'disapprove the practice of smuggling additional questions into a case after we grant certiorari.'" *Id.* (quoting *Irvine v. California*, 347 U.S. 128, 129 (1954)).

Similarly, the Court has often expressed its reluctance to allow litigants to raise issues that were not argued and decided in the proceedings below. When a case has been litigated through the federal courts, it is only in "exceptional" circumstances that the Court will consider a question that was not fully vetted and passed upon below, even if it is squarely presented in the petition for certiorari. *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980). The rationale underlying this policy was succinctly summed up by one commentator: "Better ten wrong decisions in the lower courts than one half-baked opinion from the Supreme Court." Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 618 (1984). Nevertheless, the Solicitor General's historic introduction of a new issue into the Court's

Williamson County deliberations, like a genie that escapes its bottle, could not be contained.

Hamilton Bank's opposition brief disposed of the Solicitor General's proposed analogy between takings cases and the procedural due process issue posed by *Parratt v. Taylor*. In *Parratt*, a prison inmate sued the warden, alleging that the prison's loss of some hobby materials the prisoner had ordered deprived him of property without due process of law, in violation of the Fourteenth Amendment. *Parratt*, 451 U.S. at 529-30. The Court ruled that there had been no due process violation because the loss of the materials resulted from prison employees' random and unauthorized acts, rather than from any established procedure. The availability of a tort remedy under state law therefore provided the inmate with an adequate means of redress for his loss that satisfied the requirements of due process. *Id.* at 543–44. Hamilton Bank pointed out to the *Williamson County* Court that the regulatory taking at issue in that case, like virtually all takings effected by the application of restrictive land-use regulations, occurred only after exhaustive formal proceedings as a matter of legislative or administrative policy. Since no random, unauthorized, or even unforeseen acts were involved, *Parratt* was clearly inapposite and there was no logical bar to seeking a "post-deprivation remedy" (i.e., just compensation) in federal court. Brief for Respondent, *Williamson County*, 473 U.S. 172 (No. 84-4), U.S. S. Ct. Briefs LEXIS 1235, at *68-69.

Hamilton Bank's brief also corrected the Solicitor General's assertion that just compensation for the taking would have been available under Tennessee

law, if the case had been filed in state court. *Id.* at *67 n.16. The fact that Tennessee's inverse condemnation procedures applied only to takings effected by physical occupation, and therefore offered no possible remedy in this case, was reiterated at oral argument without questioning from the Court. Transcript of Oral Argument, *Williamson County*, 473 U.S. 172 (No. 84-4), 1985 U.S. Trans LEXIS 76, at *36-37. In general, scant attention was given to the Solicitor General's peculiar digression at oral argument, at the conclusion of which there was little reason to suppose it would play any role in the Court's decision.

C. Ultimately, the *Williamson County* Majority Crafted a New Ripeness Doctrine Out of Whole Cloth, Based Largely on Behind-the Scenes Debate and Negotiations Within the Court Itself

Following oral argument, the *Williamson County* Court seemed uncertain how to dispose of the case. Justice Blackmun, who was assigned to write the majority opinion, candidly recorded his impression that "I am not sure I fully understand this case." *See* hand-written note dated February 18, 1985. Library of Congress: Harry A. Blackmun Papers, Box No. 425, case folder 84-4. Justice Rehnquist, who had reservations about treating the case as coming under the Takings Clause at all, seemed taken with the alternative of reversing on ripeness grounds, but only if Justice Blackmun would tie the rationale for dismissal to *Parratt*. *See* Memorandum from Justice Rehnquist to Chief Justice Warren Burger dated Feb. 25, 1985. Library of Congress, *id.* Eventually, despite the urging of his clerk – a future

distinguished law professor at New York University – that it was "dangerous to leave the impression that *Parratt* is directly analogous to takings claims," Justice Blackmun acquiesced. *See* Memorandum from Vicki Been to Justice Blackmun dated June 12, 1985. Library of Congress, *id.*

Justice Blackmun's majority opinion, issued on June 28, 1985, began by acknowledging the Court's two previous failures to resolve the necessity of a compensation remedy for temporary takings, but once more set aside this issue "for another day." *Williamson County*, 473 U.S. at 185. Hamilton Bank's claim for compensation was found to be premature because a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," which had not occurred in this case. *Id.* at 186. But then, having already disposed of the takings claim as unripe for lack of a final decision, Justice Blackmun went on to set out a "second reason" for reversing the Sixth Circuit: because the property owner "did not seek compensation through the procedures the State provided for doing so." *Id.* at 194. The opinion took pains to avoid labeling this holding for what it was — an unprecedented requirement, coined on the spur of the moment, without briefing or argument in the lower courts. However, Justice Blackmun's efforts to ground the state procedures requirement in the Court's previous jurisprudence merely highlighted the absence of any plausible rationale for the new rule.

II.

THE STATE LITIGATION REQUIREMENT WAS BASED ON NO PREEXISTING LEGAL PRINCIPLE OR DOCTRINE

A. The *Williamson County* Court Struggled Futilely to Find Some Doctrinal Anchor for Its Newly Minted Ripeness Requirement

Though repeatedly claiming to have some basis in previous decisions, Justice Blackmun's majority opinion in *Williamson County* struggled futilely to find some doctrinal anchor for the state litigation requirement. Forming a majority for dismissal on ripeness grounds had depended on crafting some sort of analogy to the due process rule of *Parratt v. Taylor*, yet Hamilton Bank's opposition brief on the merits had plainly demonstrated that no such analogy could validly be drawn. The result was a Jekyll-and-Hyde approach, clinging to the *Parratt* analogy on the one hand, while admitting it actually had no application to the case.

Echoing the issue presented by the Solicitor General's amicus brief, the *Williamson County* opinion began by asserting:

> The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt v. Taylor*.

473 U.S. at 195. Yet only a few sentences later, a footnote acknowledges what Hamilton Bank had pointed out in its opposition brief:

> The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations such as those involved [in this case], in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process.

Id. at 195 n. 14. Yet even though this recognition completely obviated any correspondence between *Parratt* and a typical regulatory takings claim, Justice Blackman shored up the defective analogy by simple assertion:

> Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking.

Id. at 195. This sentence is notable because of its critical ambiguity: both the Williamson County Regional Planning Commission and the Tennessee state courts are referred to as "the State," suggesting some institutional identity between the entity responsible for the taking (the Commission), and one capable of requiring the Commission to comply with its constitutional obligation to pay compensation (the state judiciary). But the identification of the two public entities is plainly spurious. Had the final

clause read, "the Planning Commission's action here is not 'complete' until the Tennessee state courts fail to order it to provide adequate compensation for the taking," the underlying non sequitur would have been obvious. Why should it be the special responsibility of the Tennessee state courts, rather than the United States District Court for the Middle District of Tennessee, to enforce the terms of the federal Constitution on a county agency? Because that fundamental question was addressed nowhere in the *Williamson County* opinion, Justice Blackmun's comparison to *Parratt* ultimately amounted to little more than a distraction.

B. In a Second Flawed Analogy, *Williamson County* Misconstrued the State Judiciary as the Functional Equivalent of the Court of Federal Claims

Having all but abandoned any serious reliance on *Parratt* in footnote 14, Justice Blackmun's search for doctrinal support for the state litigation rule landed upon an even more peculiar analogy, with *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The *Monsanto* Court, according to *Williamson County*, "held that takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U.S. at 195. Yet the "process provided by the Tucker Act" is simply a suit for just compensation for the taking, filed in the Court of Federal Claims. Under the Act, 28 U.S.C. § 1491, the Court of Federal Claims has exclusive jurisdiction over claims for monetary damages against the United States in excess of $10,000 that arise under the Constitution, including Fifth

Amendment takings claims. No other court, at any level, has original jurisdiction to hear to such claims. The passage in *Monsanto* cited by Justice Blackmun stands for the proposition that declaratory and injunctive relief are not available as remedies for a taking by the federal government, regardless of the forum. Monsanto's claim for equitable relief was "premature" only in the sense that the plaintiff had sought (and been granted) the wrong remedy.

But *Williamson County*'s citation to *Monsanto* was not unique. Indeed, every takings case cited in this section of the opinion – every case, that is, except the concededly irrelevant procedural due process claims – dealt with the hypothetical or actual availability of compensation from the federal government in the Court of Federal Claims or its predecessor, the Court of Claims. This suggests another flawed analogy at work in crafting the state litigation requirement: A takings case against the federal government filed in federal district court would be dismissed because the proper forum to hear such a claim is the Court of Federal Claims. Similarly, a takings suit against a governmental subdivision of a State filed in federal district court should be dismissed, because the proper forum to hear such a claim is the courts of that State.

The Court of Federal Claims, however, has been granted exclusive jurisdiction by Congress to hear Fifth Amendment takings claims brought against the federal government. The state courts hold no such exclusive jurisdiction over takings claims brought against state and local entities, and in fact, 42 U.S.C. § 1983 creates a federal cause of action to redress such claims. Once again, *Williamson County*'s

attempt to find some doctrinal support for the state litigation requirement, even by analogy, was unavailing.

C. At Bottom, the State Litigation Requirement Rested On an Implicit Non Sequitur

The sole remaining jurisprudential prop for the state litigation requirement was Justice Blackmun's famous truism, as self-evident as it is devoid of meaning in this context: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Obviously, plaintiffs do not bring suit for a violation of the Takings Clause unless they can allege there has been a taking without just compensation; that is the gravamen of the complaint. The question the *Williamson County* Court chose to decide without addressing was, what is the proper court in which to adjudicate such complaints? The Court's implied syllogism was:

> **A.** A taking does not violate the Constitution unless it is without compensation;
>
> **B.** Most states have judicial procedures for obtaining compensation for a taking; therefore
>
> **C.** Until a plaintiff has utilized these state procedures and been denied compensation, there has been no constitutional violation.

But this would only hold true if the state procedures of Premise **B** were the only way to obtain compensation. In fact, Premise **B** should read:

B. Most states and the federal courts have judicial procedures for obtaining compensation for a taking.

This correction makes it clear that the Court's conclusion was simply a non sequitur. What's needed is an additional premise, providing a reason to require that compensation be sought only in the state courts, instead of their federal counterparts.

Unfortunately, Justice Blackmun's tautological recitation of the constitutional text sheds no light whatsoever on that question. Yet the line, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation" was destined to become virtually a mantra, endlessly repeated over the next three decades by federal judges as the basis for dismissing fully ripe Fifth Amendment claims by litigants who had come before them to establish that their property had been taken without just compensation.

At the time *Williamson County* was handed down, almost no commentators grasped the full significance of the new state litigation rule. The most common reaction to the opinion was frustration that the Court had once again failed to reach the issue of whether compensation is required for a temporary taking. Some analysts casually reported the new state litigation requirement as if it were quite unproblematic. Only Henry Paul Monaghan, writing in the Columbia Law Review, seemed to grasp the fundamental incoherence of the Court's new doctrine, and its potential implications for the future of takings law:

> No authority supports the use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked. . . . Ripeness is concerned only with the timing of access to the district courts; but *Parratt* completely bars access, if the state corrective process is adjudged "adequate."

Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989–90 (1986). The full significance of that observation would gradually be brought home to takings plaintiffs over the coming decades.

III.

BECAUSE *WILLIAMSON COUNTY*'S NEW "RIPENESS" RULE RESTED ON NO PRE-EXISTING CONSTITUTIONAL DOCTRINE, ADDITIONAL FACETS OF THE RULE HAVE BEEN ADDED HAPHAZARDLY OVER TIME, AS THE COURT DISCOVERED THEM IN RESPONSE TO THE CIRCUMSTANCES OF PARTICULAR CASES

Largely because the state litigation rule was grounded in no preexisting doctrine, the requirement has never fit comfortably within the overall body of federal practice and procedure. This has resulted in a series of ad-hoc revisions and adjustments to *Williamson County*'s "ripeness" doctrine over time, at first merely resulting in contradictory and inexplicable applications of the rule, but eventually

changing its very nature from what the *Williamson County* majority envisioned.

For example, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 174 (1997), the Court held that a governmental defendant that was sued for a taking in state court could properly remove the claim to federal district court. By statute, removal is proper only for claims over which "the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Under *Williamson County*, however, the district courts would not have jurisdiction over a takings claim against a city until it had been fully litigated in state court – the very thing that is prevented by removal!

College of Surgeons therefore established an unprecedented procedural asymmetry in federal law: takings plaintiffs could not file their claims in federal court initially, but governmental defendants could remove them there from state court, if they so desired. Frankly observing that the juxtaposition of *Williamson County* and *College of Surgeons* was "anomalous," the Eighth Circuit Court of Appeals concluded that how to resolve that conundrum "is for the Supreme Court to say, not us." *Kottschade v. City of Rochester*, 319 F. 3d 1038, 1041 (8th Cir. 2003). Yet the Court declined the Eighth Circuit's invitation to resolve this seemingly contradictory treatment of takings plaintiffs and defendants, which remains anomalous to this day.

The same year *College of Surgeons* was handed down, in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733–34 (1997), the Court for the first time characterized the state litigation requirement as a "prudential" ripeness hurdle. Although *Suitum*

involved only *Williamson County*'s first prong, requiring administrative finality, Justice Souter's decision noted that *Williamson County* established "*two* independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court." *Id.* (emphasis added). This point was reiterated in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 707 (2010), wherein the majority noted that the petitioner's failure to seek just compensation in state court did not bar its Fifth Amendment takings claim, because the state litigation requirement was not jurisdictional. *Id.* at 728-29.

The idea that the state litigation rule is prudential, suggesting that federal judges were free to waive the requirement on a case-by-case basis, seems wholly incompatible with the reasoning of *Williamson County* itself. Justice Blackmun's insistence that a violation of the Takings Clause was not "complete" until the plaintiff had sought and been denied just compensation through state procedures cannot be squared with the possibility that an Article III court could exercise jurisdiction over such a claim even though that "ripening" requirement had not been met.

It is probably the case that "[t]he conversion of the state litigation rule into a prudential concept . . . arises from the persistent, general consensus that the requirement is not a well-reasoned or functional ripeness concept." J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 347-48 (2014). But in any case, such a shift in

understanding certainly cannot be accounted for by anything in *Williamson County* itself.

While this new interpretation allowed an occasional takings plaintiff to slip through the federal courthouse door on a random and unpredictable basis, *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, slammed that door shut on plaintiffs who attempted in good faith to "ripen" their federal claims as *Williamson County* required. In *San Remo*, the Court held that, once just compensation for a taking has been sought and denied in state court – as required by *Williamson County* – issue preclusion would prevent litigating the "ripened" takings claim in federal court – as promised by *Williamson County*. 545 U.S. at 327.

Justice Stevens's unanimous *San Remo* opinion framed the issue as one of refusing to "[give] losing litigants access to an additional appellate tribunal," *id.* at 345, and extolled the competence of state judges to hear federal takings claims. *Id.* at 347. But totally absent from the opinion was any justificatory rationale for forcing federal takings claimants to face issue preclusion by relegating their cases to state court in the first place. *Williamson County*'s state litigation requirement was simply taken as given, and if that rule had the effect of barring plaintiffs from asserting violations of their federal constitutional rights in federal court, the majority saw no grounds for concern. In place of the Court's historical affirmation of the need to assure that all citizens have access to the federal courts under 42 U.S.C. § 1983 (*see Mitchum v. Foster*, 407 U.S. 225, 242 (1972)), Justice Stevens noted dismissively, "it is entirely unclear why [petitioners'] preference for a

federal forum should matter for constitutional or statutory purposes," 545 U.S. at 344, and declared it "hardly a radical notion" to permanently consign federal constitutional claimants to state court. *Id.* at 346-47.

What is most evident about the *San Remo* opinion is that it dispenses once and for all with any pretense that the state litigation requirement has anything to do with ripeness.

> The *San Remo Hotel* Court barely discussed ripeness in reaching its holding. . . . [The] decision spends more time discussing comparative competency, suggesting that the Court was more focused on . . . judicial economy than defining the record.

Eric A. Lindberg, *Multijurisdictionality and Federalism: Assessing San Remo Hotel's Effect on Regulatory Takings*, 57 UCLA L. Rev. 1819, 1860–61 (2010). *San Remo* established beyond question that the fundamental conceptual basis of *Williamson County* – that federal takings claims are merely "premature" until compensation has been sought from the state, 473 U.S. at 197, whereupon litigants may return to a federal forum to vindicate their federal constitutional rights – was simply mistaken. After 20 years of case-by-case evolution, the state litigation requirement in *San Remo* had finally morphed into the antithesis of itself.

But if sending federal takings claimants to state court cannot ripen their federal claims, why should they be sent there at all? This question, that was never squarely faced in *Williamson County*, was

simply ignored in *San Remo*. In a perverse way, it was as if *Williamson County* finally had become genuinely analogous to *Parratt v. Taylor*, and Professor Monaghan's words (see above at page 18) could now be revised to:

> Ripeness is concerned only with the timing of access to the district courts; but [*Williamson County*] completely bars access, if the state corrective process is adjudged "adequate."

IV.

THE STATE LITIGATION REQUIREMENT DID NOT SPRING FROM FEDERALISM CONCERNS

It is sometimes suggested that *Williamson County*'s relegation of federal takings claims to state court may originate in a concern for principles of federalism. See John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 Envtl. L. Rep. News & Analysis 10735, 10748 (2013) ("The just-compensation prong of *Williamson County* ripeness doctrine . . . has nothing to do with ripeness and everything to do with federalism."); Michael R. Salvas, *A Structural Approach to Judicial Takings*, 16 Lewis & Clark L. Rev. 1381,1384 n.7 (2012) (*Williamson County* "reflect[s] a concern on the Court for federalism in the takings context"); Lindberg, *Multijurisdictionality and Federalism*, *supra*, at 1853 ("Principles of federalism help explain why it makes sense to delegate the majority of regulatory takings litigation to state courts.");

Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion under Williamson County*, 26 Ecology L.Q. 1, 47 (1999) ("State court enforcement of federal law is . . . central to the principle of federalism.")

Nothing, however, in the *Williamson County* decision or the record of the Court's deliberations, supports the idea that federalism played any role in banning Hamilton Bank's takings claim from federal court. Moreover, federalism has not been mentioned in any of this Court's subsequent references to the state litigation requirement. Chief Justice Rehnquist, who was a member of the *Williamson County* majority, noted in his *San Remo* concurrence that "[t]he Court today makes no claim that any . . . longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed." *San Remo*, 545 U.S at 350 (Rehnquist, C.J., concurring in the judgment). The Chief Justice went on to point out that *San Remo*'s invocation of greater state-court familiarity with local land use disputes is not comparable to "the type of historically grounded, federalism-based interests" that justify the relegation of other claims to state court. *Id.* The lower federal courts have been similarly reticent to tie *Williamson County*'s state litigation requirement to any concern for federalism.

Finally, the clearest indication that federalism is not an animating force behind the state litigation requirement is the doctrinal asymmetry introduced by *City of Chicago v. International College of Surgeons*. While plaintiffs asserting a regulatory

taking must file their claims in state court under *Williamson County*, governmental defendants in those same cases enjoy unimpeded access to a federal forum, if they choose, by asserting removal jurisdiction. 522 U.S. at 160-61, 174. Once a case has been removed at the defendant's behest, a federal judge goes about the routine business of hearing evidence concerning the impact of regulatory restrictions on the property at issue, with no more concern for the supposed complexities of state land-use law than would pertain in hearing a pendant state claim for trespass or a quiet-title action. It is quite impossible to advance a federalism-based rationale for relegating plaintiffs raising regulatory takings claims to state court, while permitting defendants to have the identical claims adjudicated in a federal forum, should they choose to do so.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision below and overrule *Williamson County*'s holding that Fifth Amendment takings claims are not ripe for adjudication in federal court until the plaintiff has sought compensation through state procedures.

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Respectfully submitted,

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